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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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09/784,292

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Amy L. Fletcher

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04/30/2004

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EXAMINER

REICHLE, KARIN M

ART UNIT

PAPER NUMBER

3761

DATE MAILED: 04/30/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

09/784,292

Applicant(s)

FLETCHER ET AL.

Examiner

Karin M. Reichle

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 09 February 2004.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-40 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-40 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 09 February 2004 is/are: a) ☐ accepted or b) ☒ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. _____.
 - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- ☒ Notice of References Cited (PTO-892)
- ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date _____
- ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date _____
- ☐ Notice of Informal Patent Application (PTO-152)
- ☐ Other: _____

DETAILED ACTION

Specification

Drawings

1. The drawings were received on 2-9-04. These drawings are not approved by the Examiner. See accompanying PYO-948, if any. Figure 8 which shows a series of perforations in each panel is not approved because such is considered to be new matter in that it exceeds the scope of the specification as originally filed because such is not considered a "seam" as such is commonly defined, i.e. it is not a line of juncture across a surface joining two sections.

2. The drawings are objected to under 37 CFR 1.83(a). The drawings must show every feature of the invention specified in the claims. Therefore, the seam in each panel as claimed in claim 39 must be shown or the feature(s) canceled from the claim(s). No new matter should be entered.

A proposed drawing correction or corrected drawings are required in reply to the Office action to avoid abandonment of the application. The objection to the drawings will not be held in abeyance.

Claim Language Interpretation

3. The interpretation of the claim language "a waist edge nonparallel with a leg edge when the first and second side panels are in a laid flat configuration" is interpreted as set forth on page 11, last paragraph of the 2-9-04 response and is supported by page 29, lines 16-19, Figures 4-7 and page 5, lines 10-21 of the specification.

Claim Rejections - 35 USC § 103

4. The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

5. Claims 1-2, 5-12, 14-21, 23, 25, 27, 29-30, 34 and 36-39 are rejected under 35 U.S.C. 103(a) as being unpatentable over Kuen '162 in view of Keuhn, Jr. et al, '262, and Sauer '428.

Claim 1: see Figures, chassis is 22, col. 3, lines 31-38, side panels are 40, col. 4, lines 16-19, fastening components are 56, col. 5, lines 55-56, mating fastening components are 42, 44, col. 4, lines 16-19.

Claim 2: see col. 4, lines 19-21 and col. 5, lines 55-56.

Claim 5: see page 31, lines 6-7 of the instant specification, i.e. "Material ... renders ... suitable...wipes", in other words a material capable of use as a wipe. As defined by the American Heritage Dictionary, "wipe" is "To subject to light rubbing or friction, as of a cloth or paper, in order to clean or dry". In other words a cloth or paper is deemed a material or structure capable of use as a wipe. See col. 10, line 50-col. 11, line 52 of Kuen which discloses cloth side panels. Therefore the Kuen device necessarily and inevitably includes the claimed structure.

Claim 6: see col. 4, lines 7-10.

Claim 7: see col. 5, lines 38-48.

Claim 8: see col. 5, lines 57-59.

Claim 9: see col. 4, line 7(note "may" inherently includes "may not"), and col. 5, lines 38-48.

Claims 10-11: see col. 3, lines 23-24.

Claim 12: Applicant's claim the side panels comprise a "durable" material, i.e. the side panel material has the capability of multiple reuse. Note page 3, lines 1-2, page 7, lines 11-16, the paragraph bridging pages 30-31 and page 39, lines 16-20 of the instant specification, i.e. side panels of elastomeric components such as laminates of '220 are reusable, i.e. "durable". See col. 1, lines 11-26, col. 10, line 50-col. 11, line 11 of Kuen '162, i.e. the attachment system for use with disposable articles as well as reusable articles, i.e. underwear, bathing suits, includes side panels of elastomeric components such as laminates of '220, i.e. Kuen includes elastic panels of the same material as those disclosed by Applicants, i.e. the panels are necessarily and inevitably "durable".

Claims 14-16: see discussion of claims 7-8 supra or col. 10, line 57-col. 11, line 13.

Claims 17-20: see col. 1, lines 11-20 and col. 3, lines 23-30.

Claims 21, 23, 25, 27, 29, 34, 36-38: see discussion of claims 1-2, 5-11, and 14-20 supra. Additionally see col. 4, line 55-col. 5, line 31, i.e. "preferably" does not require the preferred structure, i.e. desirably though not necessarily, i.e. the pads 42, 44 do not have to be spaced from the ends. Thus, the seams formed by the hook and loop fasteners can run from the waist opening to the leg openings.

Claim 30: see col. 5, lines 31-33.

Claim 39: see col. 6, line 38-col. 7, line 6, i.e. bonds form tearable, non-refastenable seams.

Therefore, the Kuen '162 device includes all the claimed structure except for the side panels each having a waist edge nonparallel with the leg edge when the first and second side

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panels are in a laid flat configuration, see Claim Language Interpretation section *supra*. The Kuen '162 device includes each panel 40 having waist and leg edges which are parallel in the laid flat configuration, see Figure 3 and col. 5, line 59, i.e. the strap member may be rectangular. However, at col. 5, lines 62-62 Kuen '162 also sets forth that material of region 50 can also be other shapes. See also Keuhn Jr. et al '262 at Figure 1 and Figure 6 and col. 5, lines 37-38, and col. 9, line 45-col. 10, line 2, i.e. panel or strap members which are releaseably connected or permanently connected to the back waist region but releaseably connected to the front waist region are interchangeable, and Figures 1 and 4, col. 8, lines 31-36 and col. 9, lines 1-5 of Sauer, i.e. panel or strap members which are permanently connected to the back waist region but releaseably connected to the front waist region and nonstretchable, stretchable, nonelastic, or elastic can be rectangular in shape or other shapes in which the waist edge is nonparallel with the leg edge when in a laid flat configuration. To make the panel waist edges which are parallel with the leg edges when in a laid flat configuration of Kuen '162 panel waist edges which are nonparallel with the leg edges in a laid flat configuration would be obvious to one of ordinary skill in the art in view of the interchangeability as taught by Keuhn Jr. et al '262 and Sauer.

6. Claims 13, 31-33 and 40 are rejected under 35 U.S.C. 103(a) as being unpatentable over Kuen '162, Keuhn Jr. et al '262 and Sauer '428 as applied to claims 10, 21 and 34 *supra*, and further in view of Yeo '913 and Wallach '734.

Applicants claim flushability of at least one of or all of the cover, liner and absorbent of the chassis. Kuen teaches a disposable undergarment 20 including a cover, liner and absorbent and the desire for economic efficiency, see col. 3, lines 33-38 and col. 9, lines 1-4 and 8-9, but not flushability of the cover, liner and absorbent. However, see col. 1, lines 16-23 and 29-40,

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col. 5, lines 27-29 and 49-52 and col. 22, Example 17, and col. 23, Examples 22-25 of Yeo and col. 1, lines 13-17 and 39-43, col. 2, lines 4-6 and col. 4, lines 21-25 of Wallach. To employ flushable components for at least one, if not all, of the cover, liner and absorbent of the Kuen disposable device as taught by Yeo and Wallach would be obvious to one of ordinary skill in the art in view of the recognition that such would provide more economic but environment disposability and the desirability of disposability and economic efficiency by Kuen.

7. Claims 3 and 35 are rejected under 35 U.S.C. 103(a) as being unpatentable over Kuen '162, Keuhn Jr. et al '262 and Sauer '428 as applied to claims 1 and 34 supra, and further in view of Kuen '789.

Applicants claim the components of the fasteners on the side panels of loop material and the components of the fasteners on the front and back panels of the chassis being hook material whereas Kuen '162 teaches the opposite. However see Kuen '789, col. 3, line 65-col. 4, line 4, col. 5, lines 66-68, col. 9, lines 58-61. To reverse the components of Kuen '162 such that the side panel fastener components are loop material while the chassis fastener components are hook material instead would be obvious to one of ordinary skill in the art in view of the interchangeability as taught by Kuen '789.

8. Claim 4 is rejected under 35 U.S.C. 103(a) as being unpatentable over Kuen '162, Keuhn Jr. et al '262 and Sauer '428 as applied to claim 1 supra, and further in view of LaFortuna '901.

Applicant claims the fastening components of the side panels include two hook and two loop material components and the mating fastening components of the chassis include two loop and two hook material components, respectively, whereas Kuen teaches that the fastening

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components are all hook material and the mating fastening components are all loop material. However see LaFortuna, col. 8, lines 31-37 and col. 7, line 61-col. 8, line 14, i.e. the surfaces of the components that interlock with each other can be either hook or loop material as long as they lock with each other. To make the hook fastening components and loop mating fastening components of Kuen '162 fastening components including two hook and two loop material components and the mating fastening components including two loop and two hook material components, respectively, instead would be obvious to one of ordinary skill in the art in view of the interchangeability as taught by LaFortuna.

9. Claims 22, 24, 26, and 28 are rejected under 35 U.S.C. 103(a) as being unpatentable over Kuen '162, Keuhn Jr. et al '262 and Sauer '428 as applied to claim 21 supra, and further in view of Ygge et al '593.

Applicant claims the fastening material of the chassis being on the inner surface thereof while the mating fastening material of the side panel is on the outer surface thereof which is the opposite of what Kuen teaches. See Figures 1-7 and col. 5, lines 20-27 of Ygge. To make the chassis outside fasteners and the inside side panel mating fasteners of Kuen chassis inside fasteners and side panel outside mating fasteners instead would be obvious to one of ordinary skill in the art in view of the interchangeability as taught by Ygge et al.

Double Patenting

10. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686

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F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and, *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

11. Claims 1-2, 6, 10-11, 17, 19, 21, 30, 34 and 35 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-16, 20-26, 28-45 and 48-51 of copending Application No. 10/032,383(2003/0120253). Although the conflicting claims are not identical, they are not patentably distinct from each other because, even though the other application was filed later, since there is no administrative delay, the one way in *re Vogel* test applies, i.e. are the claims of the instant application obvious in view of the claims of the other application? The answer is yes. The claims of the instant application are broader than the claims of the other application in some aspects, e.g. claim 1 does not claim the surfaces attached to are the outside surfaces, and narrower in other aspects, e.g. the independent claims claim at a minimum two pieces of material. With regard to the former, once the applicant has received a patent for a species or a more specific embodiment, he/she is not entitled to a patent for the generic or broader invention. This is because the more specific anticipates the broader. With regard to the latter, since the general conditions of a instant claim are disclosed in the claims of the other application, i.e. fastener of at least one material piece for adjustable fastening, it is not inventive to discover the optimum number of pieces of material by routine experimentation, i.e. two pieces of material allow more adjustability then one piece, see *In re Allen et al*, 105 USPQ 233.

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This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

Common Ownership

12. Claims 1-2, 6, 10-11, 17,19, 21, 30, 34 and 35 are directed to an invention not patentably distinct from claims 1-16, 20-26, 28-45 and 48-51 of commonly assigned 10/032,383(2003/0120253). Specifically, see the double patenting rejection supra

The U.S. Patent and Trademark Office normally will not institute an interference between applications or a patent and an application of common ownership (see MPEP § 2302).

Commonly assigned 10/032,383, discussed above, would form the basis for a rejection of the noted claims under 35 U.S.C. 103(a) if the commonly assigned case qualifies as prior art under 35 U.S.C. 102(f) or (g) and the conflicting inventions were not commonly owned at the time the invention in this application was made. In order for the examiner to resolve this issue, the assignee is required under 35 U.S.C. 103(c) and 37 CFR 1.78(c) to either show that the conflicting inventions were commonly owned at the time the invention in this application was made or to name the prior inventor of the conflicting subject matter. Failure to comply with this requirement will result in a holding of abandonment of the application.

A showing that the inventions were commonly owned at the time the invention in this application was made will preclude a rejection under 35 U.S.C. 103(a) based upon the commonly assigned case as a reference under 35 U.S.C. 102(f) or (g), or 35 U.S.C. 102(e) for applications filed on or after November 29, 1999.

Response to Arguments

13. Applicants remarks with respect to matters of form have been considered but are either deemed moot in that such issues have not been reraised or are deemed not persuasive in light of the comments set forth supra. Applicant's remarks with respect to the prior art have been considered but are deemed not persuasive in light of the new prior art rejection set forth supra.

Conclusion

14. Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than **SIX MONTHS** from the date of this final action.

Any new grounds of rejection were necessitated by the added language and deleted language of the independent claims and the remarks at page 11, last paragraph of the 2-9-04 response.

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15. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Karin M. Reichle whose telephone number is (703) 308-2617.

The examiner can normally be reached on Monday-Thursday.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, John Calvert can be reached on (703) 308-1025. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

K.M. Reichle

Karin M. Reichle
Primary Examiner
Art Unit 3761

KMR
April 22, 2004